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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 GABRIEL BERRY,

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12 Plaintiff,

13 v.

14 ANDREW SAUL, Commissioner of
Social Security,

15
16 Defendant.

Case No.: 16cv1700-MMA (AGS)

**ORDER GRANTING PLAINTIFF'S
COUNSEL'S MOTION FOR
ATTORNEYS' FEES PURSUANT TO
42 U.S.C. § 406(b)**

[Doc. No. 36]

17
18 Young Cho, counsel for Gabriel Berry ("Plaintiff"), moves for an award of
19 attorneys' fees pursuant to 42 U.S.C. § 406(b) in the amount of \$20,400.00. *See* Doc.
20 No. 36-1.¹ Andrew Saul, the Commissioner for Social Security, ("Defendant") takes no
21 position on the reasonableness of counsel's request. The Court found the matter suitable
22 for determination on the papers and without oral argument pursuant to Federal Rule of
23 Civil Procedure 78(b) and Civil Local Rule 7.1.d.1. *See* Doc. No. 37. For the reasons set
24 forth below, the Court **GRANTS** Plaintiff's counsel's motion for attorneys' fees.

25 **BACKGROUND**
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¹ All citations refer to the pagination assigned by the CM/ECF system.

1 On June 30, 2016, Plaintiff filed this social security appeal challenging the denial
2 of his application for disability benefits. *See* Doc. No. 1. The parties filed cross-motions
3 for summary judgment, and the assigned magistrate judge issued a well-reasoned Report
4 recommending that the Court grant Plaintiff's motion. *See* Doc. Nos. 19, 22, 31. On
5 September 6, 2017, the Court adopted the Report and Recommendation in its entirety and
6 remanded the action to the Social Security Administration for further proceedings. *See*
7 Doc. No. 32.

8 On remand, the administrative law judge found Plaintiff disabled within the
9 meaning of the Social Security Act as of January 5, 2009. *See* Doc. No. 36-3 at 13, 14.
10 On August 21, 2019, the Social Security Administration issued a Notice of Award, which
11 acknowledged Plaintiff's past-due benefits amounted to \$81,987.42. *See* Doc. No. 36-4
12 at 3. Plaintiff's counsel now moves for an award of \$20,400.00 in attorneys' fees for
13 representing Plaintiff in this action, with credit for the Equal Access to Justice Act
14 ("EAJA") fees previously paid in the amount of \$8,800.00, thus asking for certification of
15 the net fee of \$11,600.00. *See* Doc. No. 36-1, at 2, 8.

16 **LEGAL STANDARD**²

17 "Under 42 U.S.C. § 406(b), a court entering judgment in favor of [a social
18 security] claimant who was represented by an attorney 'may determine and allow as part
19 of its judgment a reasonable fee for such representation, not in excess of 25 percent of the
20 total of the past-due benefits to which the claimant is entitled by reason of such
21 judgment.'" *Crawford v. Astrue*, 586 F.3d 1142, 1147 (9th Cir. 2009) (en banc) (quoting
22 § 406(b)(1)(A)). "Within the 25 percent boundary, . . . the attorney for the successful
23 claimant must show that the fee sought is reasonable for the services rendered."

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25 ² Plaintiff's counsel brings this motion pursuant to 42 U.S.C. § 1383(d)(2)(B), which governs the
26 procedures surrounding fee awards. Doc. No. 36 at 1. In part, § 1383 provides that "[t]he provisions of
27 section 406 of this title . . . shall apply to this part to the same extent as they apply in the case of
28 subchapter II of this chapter. . . ." 42 U.S.C. § 1383(d)(2)(A). Given this and the fact that counsel's
motion also relies upon § 406, the Court construes counsel's motion as a request for § 406(b) fees. *See*
De La Cruz v. Astrue, No. 1:08CV0782 DLB, 2012 WL 6136446, at *1 (E.D. Cal. Dec. 10, 2012).

1 *Gisbrecht v. Barnhart*, 535 U.S. 789, 807 (2002).³

2 “[A] district court charged with determining a reasonable fee award under
3 § 406(b)(1)(A) must respect ‘the primacy of lawful attorney-client fee agreements,’ . . .
4 ‘looking first to the contingent-fee agreement, then testing it for reasonableness[.]’”
5 *Crawford*, 586 F.3d at 1148 (quoting *Gisbrecht*, 535 U.S. at 793, 808). When
6 determining reasonableness of the fee award, courts must consider “whether the amount
7 need be reduced, not whether the lodestar amount should be enhanced.” *Id.* at 1149.
8 While there is not a definitive list of factors, courts should consider “the character of the
9 representation and the results the representative achieved.” *Gisbrecht*, 535 U.S. at 808.
10 “The court may properly reduce the fee for substandard performance, delay, or benefits
11 that are not in proportion to the time spent on the case.” *Crawford*, 586 F.3d at 1151.

12 Finally, “an EAJA award offsets an award under Section 406(b), so that the
13 [amount of the total past-due benefits the claimant actually receives] will be increased by
14 the . . . EAJA award up to the point the claimant receives 100 percent of the past-due
15 benefits.” *Gisbrecht*, 535 U.S. at 796.

16 DISCUSSION

17 On March 26, 2013, Plaintiff and the Law Offices of Lawrence D. Rohlring
18 entered into a Social Security Representation Agreement (“Agreement”). Doc. No. 36-2.
19 Pursuant to the Agreement, Plaintiff agreed to pay counsel a contingency-fee of up to
20 25% of past-due benefits awarded by the Commissioner. *See* Doc. No 36-1 at 9; *see also*
21 Doc. No. 36-2. The administrative proceedings became final in August 2019 when the
22 Social Security Administration issued its Notice of Award. *See* Doc. No. 36-4.
23 Plaintiff’s counsel seeks a total award of \$20,400.00 in attorneys’ fees and “bases this fee
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25 ³ The lodestar calculation does not apply to the instant motion. *See Gisbrecht*, 535 U.S. at 802
26 (explaining that the lodestar method is applicable to “disputes over the amount of fees properly shifted
27 to the loser in the litigation” whereas “Section 406(b) is of another genre: [i]t authorizes fees payable
28 from the successful party’s recovery”); *see also Crawford*, 586 F.3d at 1148 (“SSDI attorneys’ fees, in
contrast, are not shifted. They are paid from the award of past-due benefits and the amount of the fee,
up to 25% of past-due benefits, is based on the agreement between the attorney and the client.”).

1 on 25% of the net payable past due benefits.” Doc. No. 36-1 at 3. Counsel argues that
2 the amount sought in the instant motion “falls within the range of reasonable”
3 considering “counsel’s firm expended 50.65 combined hours before the District Court
4 from the two civil actions that were necessary to the eventual granting of benefits.” *Id.* at
5 2. Additionally, if granted by the Court, this award would then be further reduced by the
6 \$8,800.00 that has already been received in attorneys’ fees under the EAJA. *Id.*

7 As an initial matter, the Court notes a seeming discrepancy in the gross and net
8 award sought. Counsel’s notice of motion states that the *gross* fee is \$21,900.00. Doc.
9 No. 36 at 1. However, counsel’s memorandum of points and authorities provides that the
10 amount sought is \$20,400.00. Doc. No. 36-1 at 2, 3, 4, 5, 6, 8. Counsel states that he
11 seeks “a fee of \$20,400.00 representing 25% of past due benefits.” *Id.* at 6. Counsel
12 represented Plaintiff “on a contingency fee basis of 25%.” *Id.* at 9; *see also* Doc. No. 36-
13 2 at 1. A fee award of \$21,900.00 would exceed 25% in light of the \$81,987.42 in past
14 due benefits. Accordingly, the Court finds counsel’s motion as one seeking attorneys’
15 fees for \$20,400.00.

16 Relatedly, counsel claims the *net* fee—after accounting for the \$8,800.00
17 previously paid—is \$13,100.00 in his notice of motion and three times in the
18 memorandum of points and authorities. Doc. No. 36 at 2; Doc. No. 36-1 at 6, 7.
19 However, counsel’s memorandum of points and authorities also claims twice that the net
20 fee is \$11,600.00. Doc. No. 36-1 at 2, 8. Given the discussion regarding the gross fee,
21 *supra*, the Court finds the intended net fee sought is \$11,600.00.

22 Upon careful review of the documents submitted, and the applicable law, the Court
23 finds that counsel’s fee request is reasonable. Plaintiff’s counsel expended 50.65 hours
24 on this case. Doc. No. 36-1 at 2; Doc. No 36-5 at 2, 4. The *de facto* hourly rate is
25 \$402.76, which falls on the low end of the range that has been approved by courts in
26 similar cases, including this Court.⁴ *See Crawford*, 586 F.3d at 1153 (approving *de facto*

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28 ⁴ The *de facto* hourly rate is calculated by dividing the \$20,400.00 fee request by 50.65 hours.

1 hourly rates of \$519, \$875, and \$902 in 2009); *Martinez v. Berryhill*, No. 13-cv-272-JLS
2 (JLB), 2017 WL 4700078, at *3 (S.D. Cal. Oct. 19, 2017) (approving *de facto* hourly rate
3 of \$886.52 and noting that “[w]hile such an hourly rate is on the higher end charged for
4 social security appeals, the Court nonetheless concludes that the fee is reasonable in the
5 present case.”); *Richardson v. Colvin*, No. 15-cv-1456-MMA (BLM), 2017 WL 1683062,
6 at *2 (S.D. Cal. May 2, 2017) (approving *de facto* hourly rate of \$770); *Nash v. Colvin*,
7 No. 12-cv-2781-GPC (RBB), 2014 WL 5801353, at *2 (S.D. Cal. Nov. 7, 2014)
8 (approving *de facto* hourly rate of \$656); *Sproul v. Astrue*, No. 11-cv-1000-IEG (DHB),
9 2013 WL 394053, at *2 (S.D. Cal. Jan. 30 2013) (approving *de facto* hourly rate of
10 \$800). Plaintiff’s counsel has also submitted a billing statement detailing the work
11 performed to litigate this case in federal court. *See* Doc. No. 36-5. Moreover, “[c]ounsel
12 assumed the risk of nonpayment inherent in a contingency agreement,” and the requested
13 fee award of \$20,400.00 does not exceed the 25% “statutory cap[.]” *Moreno v. Berryhill*,
14 No. 13-cv-8492-PLA, 2018 WL 3490777, at *3 (C.D. Cal. July 19, 2018).

15 Finally, there is nothing in the record to suggest substandard performance by
16 counsel, delay, or a disproportionate amount of time spent on this case relevant to the
17 benefits at stake. As a result of counsel’s work, Plaintiff received a highly favorable
18 decision and a significant award of past-due benefits. Thus, none of the factors outlined
19 in *Gisbrecht* favor reducing the fee award, and the Court concludes that counsel’s request
20 for attorneys’ fees is reasonable.

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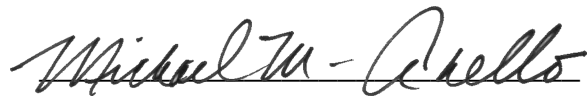
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1 CONCLUSION

2 Based on the foregoing, the Court **GRANTS** Plaintiff's counsel's motion for
3 attorneys' fees and **APPROVES** an award in the amount of \$20,400.00 to the Law
4 Offices of Lawrence D. Rohlfig, offset by \$8,800.00 in EAJA fees previously received,
5 resulting in **\$11,600.00** payable to the Law Offices of Lawrence D. Rohlfig.

6 **IT IS SO ORDERED.**

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8 Dated: November 27, 2019

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10 Hon. Michael M. Anello
11 United States District Judge
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